UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

COLUMBUS TRANSIT, LLC
Employer
and **Case No. 2-RC-23351**

TRANSPORT WORKERS UNION OF GREATER NEW YORK, LOCAL 100, AFL-CIO
Petitioner
and

LOCAL 713, UNITED BROTHERHOOD OF TRADE UNIONS, IUJAT
Intervenor

COLUMBUS TRANSIT, LLC

and **Case No. 2-CA-39193**

LOCAL 713, UNITED BROTHERHOOD OF TRADE UNIONS, IUJAT

and

TRANSPORT WORKERS UNION OF GREATER NEW YORK, LOCAL 100, AFL-CIO [1]

Robert Guerra, Esq., Counsel for the General Counsel
Stuart Weinberger, Esq., Counsel for the Employer
Polly Halfkenny, Esq., Counsel for the Petitioner
Bryan McCarthy, Esq., Counsel for the Intervenor

DECISION

Statement of Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York City on August 24, 2010.

[1] The caption is hereby amended to reflect that at the hearing I permitted Transport Workers Union of Greater New York, Local 100 to intervene in the unfair labor practice case, it already being a party to the related and consolidated representation case.

The petition in 2-RC-23351 was filed on December 22, 2008 by Transport Workers Union of Greater New York, Local 100, AFL-CIO, herein called Local 100. At the same time, Local 100 filed an unfair labor practice charge in Case No. 2-CA-39377, alleging that the Employer had unlawfully recognized Local 713, United Brotherhood of Trade Unions, IUJAT, herein called Local 713.

Pursuant to a Decision and Direction of Election issued by the Regional Director on February 5, 2009, a secret ballot election was held on March 6, 2009. In addition to Local 100 and the employer, Local 713 also participated in the election as the Intervenor.

The unit of employees that voted in the election was as follows:

Included: All full-time and regular part-time drivers employed at the Employer's facility at 701 So. Columbus Avenue, Mount Vernon, NY.
Excluded: all other employees, and guards, professional employees and supervisors as defined in the Act.

Because the Board had not yet ruled on the Employer's request for review of the Regional Director's Decision and Direction of Election, the ballots were impounded.

On March 12, 2009, Local 100 withdrew its unfair labor practice charge and on March 20, the Director issued a Supplemental Decision and Order directing that the ballots be opened and counted. The Tally of Ballots showed that of about 55 eligible voters, 24 cast ballots for Local 100, five cast votes for Local 713 and nine cast votes against any union representation.

Both the Employer and Local 713 filed timely Objections to the Election and these will be discussed below.

The charge in the consolidated unfair labor practice case, 2-CA-39193 was filed by Local 713 on March 10, 2009 and the Complaint based on this charge was issued by the Regional Director on May 29, 2009. This alleged that the Employer has since March 4, 2009 refused to bargain with that Union as the exclusive bargaining representative in the above described unit.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

a. Procedural history

The evidence in this case shows that both Local 100 and Local 713 began organizing the employees of the Company at its Mount Vernon location in or about September 2008. In this regard, Local 100 represents certain other employee of the Company at a different location and learned about Local 713's organizing efforts through people at its represented facility.

In connection with the unfair labor practice case, it was stipulated that on or about November 10, 2008, the employer voluntarily recognized Local 713 as the exclusive bargaining agent of the company's drivers at the location in question. It was also stipulated that by letter dated February 24, 2009, Local 713 notified the employer of its desire to meet and negotiate for a collective bargaining agreement and that by letter dated March 4, 2009, the employer stated that it was declining to bargain. That is the sum and substance of the General Counsel's unfair labor practice proof and no other evidence was offered by any of the other parties.

There are, however, a few things worth noting. For one thing, Local 100 had filed at one point, an unfair labor practice charge alleging that the Employer's recognition of Local 713 was illegal under Section 8(a)(1)&(2) of the Act. That charge was later withdrawn and so there is no present contention in this case that the recognition of Local 713 was illegal because that union did not represent, at the time of recognition, an uncoerced majority of the employees in the bargaining unit. Nor is there any current allegation that the recognition of Local 713 was tainted by any assistance or other improper conduct by the employer. So, for purposes of this case, I must conclude that the recognition accorded to Local 713 was legally granted and therefore, under Board law, the employer had an obligation to bargain with that union for a "reasonable period of time." *Royal Coach Lines*, 282 NLRB 1037, 1038 (1987).

The second thing worth noting is that notwithstanding the fact that recognition was granted on or about November 10, 2008, it was not until after Local 100 filed its representation petition in the same bargaining unit that Local 713 asked the company to bargain. Thus, whatever a reasonable period of time might be, Local 713 sat on its hands for almost four months and did nothing to commence negotiations after its recognition. [2]

In the meantime, Local 100 filed its petition for an election on December 22, 2008 and a hearing was held on that petition. At the hearing, Local 713 intervened and contended that its recognition agreement dated November 10, 2008 should act as a bar to an election. Moreover, the employer contended that the election process should be blocked because there was then pending an unfair labor practice charge filed by Local 100 which alleged, inter alia, that the recognition agreement was unlawful under Section 8(a)(2) of the Act. It argued that holding an election would only be proper if Local 100 withdrew or waived its Section 8(a)(2) allegations irrespective of the outcome of the election.

On February 5, 2009, the Regional Director issued a Decision and Direction of Election. In her decision, the Director concluded that in accordance with *Dana Corporation*, 351 NLRB 434 (2007) Local 100's election petition was timely filed and that an election should be held. In pertinent part, *Dana* held that where an employer voluntarily recognizes a union, it must notify the employees of the recognition and notify them that they have 45 days to either seek alternative union representation or no representation. In ordering that an election should be held, the Director stated that she did so "without prejudice and shall expressly condition any certification resulting from such election with respect to the status of the intervenor on any subsequent determinations made in the pending unfair labor practice case and shall take such action as may be deemed necessary to effectuate the policies of the act with respect thereto."

On March 6, 2009, an election was held but the ballots were impounded because the Board had not yet ruled on the Employer's Request for Review.

On March 20, the Regional Director issued a Supplemental Decision directing that the ballots be opened and counted. She held inter alia, that the withdrawal by Local 100 of its unfair labor practice charge rendered moot any question regarding the potential taint from the alleged

---

[2] I note that there was no evidence presented to show that at time after the initial grant of recognition, Local 713 representatives met with or communicated with employees as to the kinds of negotiations. There was no evidence that any representatives met with employees to discuss their issues, problems or grievances. Indeed there was no evidence to show that any representatives of Local 713 even notified the demands that they wish to have presented to the employer in the course of employees in the unit that it had been recognized by the employer as the bargaining representative.

8(a)(2) conduct and the previous Direction of Election wherein she stated that a certification that would issue to Local 713, in the event it won the election, would be held in abeyance pending completion of the alleged 8(a)(2) unfair labor practice charge.

On April 8, 2009, the Employer filed a request for review of the Regional Director's March 20 Supplemental Decision.

On May 28, 2009, the Board issued an Order rejecting the requests for review and allowed the ballots to be counted. However, at that time there were only two members on the Board and the Employer contends that this Order was without statutory authority pursuant to the Supreme Courts decision in *New Process Steel, LP v. NLRB*. I do note, however that unlike the case before the Supreme Court which involved a final order in an unfair labor practice case, an order rejecting a request for review is not a final order. Moreover, the granting of a request for review in a representation case is purely a matter of discretion by the Board. [3]

On June 5, 2009 the ballots were counted and an initial Tally of Ballots was served on the parties to the election.

On June 10, 2009, the Regional Director approved a Stipulation regarding three of the challenged ballots and it was agreed these individuals were not eligible voters. [4] Accordingly, the challenges were no longer determinative of the outcome of the election and the Regional Director issued a Revised Tally of Ballots pursuant to which Local 100 received a majority of the valid votes counted.

On June 10, 2009, the Intervenor, Local 713, filed Objections to the Election. In substance Local 713 alleged that the Employer interfered with the election by **(a)** refusing to bargain with it as alleged in the Complaint issued in Case No. 20-CA-39193; and **(b)** that the Regional Director made a number of rulings in the representation case that were either incorrect or undermined Local 713 in the eyes of prospective voters. In this regard, Local 713 alleged that the Director erred by issuing a Decision and Direction of Election notwithstanding the "recognition bar" issue and by failing to require the Petitioner to agree to waive any contention that a certification should not be granted to Local 713 in the event that the Intervenor won the election. Local 713 alleged that the wording of the original Decision and Direction of Election indicated a preference for Local 100 by stating that if Local won the election, it would be certified but that if Local 713 won the election, any certification would be held in abeyance pending the outcome of an 8(a)(2) charge. Further, Local 713 contends that the Regional Director should not have gone forward with the election in the face of the unresolved outstanding unfair labor practice complaint filed on its behalf in 2-CA-39193. (Alleging that the Employer refused to bargain with Local 713 during the period after it received voluntary recognition).

On June 10, 2009, the Employer also filed Objections to the Election. These raised essentially the same issues as raised by Local 173. However, the Employer additionally asserted that **(a)** Local 100 promised and gave benefits to employees including promising to obtain jobs for them; and **(b)** Local 100 intimidated, restrained and coerced employees by photographing, recording and taking videos of them. Finally, the Employer contends that the Board had no jurisdiction to issue the May 28, 2009 Order denying a Request for Review of the

[3] It is noted that on September 15, 2010, a three member Board issued an Order denying the Employer's requests for review without prejudice to the employer right to raise its contentions in the Objections case.

[4] These were Nelson Navarro, Santos Poggi and Augustin Massallo.

Regional Director's Supplemental Decision directing that the ballots be opened and counted since there was no quorum on the Board at the time.

b. The alleged promise of benefits by Local 100

In support of its Objections, the Employer offered the testimony of Willie Colon, who during the election campaign was employed by Local 100 and was one of a crew of four organizers for that union. It is noted that at some point after the election, Colon was discharged by Local 100 and became an employee of Local 713. He is, to my mind, an interested witness with an ax to grind against Local 100.

Colon testified that during the campaign, he told employees on various occasions that if they became members of Local 100 they would get preference for a jobs program that might be set up by the Metropolitan Transit Authority in conjunction with that Union. No employees testified about this alleged offer of benefits.

Dylan Valle, a representative of Local 100 testified that a company called American Transit whose employees were represented by Local 100 lost its contract with the MTA and that because so many drivers had been displaced, the Union and the MTA talked about the possibility of setting up a pilot program pursuant to which a depot would be opened in Greenpoint and where the drivers would be directly employed by the MTA. According to Valle, there were about seven drivers of Columbus Transit who originally came from American Transit and he testified that at some meetings, these former American Transit employees asked about the pilot program. He states that he explained that if the program was agreed to by the MTA and Local 100, the former American Transit drivers would get preferential treatment. Valle credibly denied that either he or any other representatives from Local 100 ever told employees that if they joined Local 100 they would be given preferential hiring opportunities. I note that this program was never implemented.

No employees testified about the alleged promise and there is nothing in Local 100's campaign literature that could be construed as containing such a promise. In light of the above, and based on demeanor considerations, I am going to credit the testimony of Valle and recommend that this Objection be dismissed.

c. The alleged surveillance by Local 100

Colon testified that on the day of the election, he was outside the facility in the early morning and used his cell phone to take pictures of employees as they went to work. He testified that he was about 100 feet away and across the street from the entrance. Colon also testified that on other unspecified occasions during the election campaign, he used his cell phone and a camera to take pictures of employees. No employees were presented to corroborate this testimony.

Valle testified that on the day of the election, he, Colon and two other organizers together came to the employer's premises for the pre-election meeting. He testified that when the election was about to begin, all of the organizers, including Colon, stood outside the facility. He testified that although Colon was near to him, he never saw Colon take any pictures.

I do not credit Colon's testimony in general. And in the absence of any employee corroboration, I do not credit his testimony about taking photographs, either on the day of the election or on any other day.[5] I therefore shall overrule this objection. [6]

d. The Recognition Bar Contention and related claims that the election should not have been held because of an unresolved 8(a)(2) unfair labor practice charge

As noted above, the Employer and Local 713 contend that the election should not have been held because the employer had lawfully recognized Local 713. They contend that the Board should overrule retroactively *Dana Corporation*, 351 NLRB 434 (2007) and that the election should be set aside even though Local 100 obtained the votes of a majority of the employees. In this case, having overruled the other objections described above, there is no reason to doubt that a majority of the eligible employees voted to be represented by Local 100 in an election that was untainted by any other coercive conduct. The argument of the Employer and Local 713 boils down to a contention that in these circumstances, the employees' choice manifested in a secret ballot election, is simply not relevant.

In this case, the Decision and Direction of Election was issued under the rationale of *Dana* and that is still the current law. It is not up to me to overrule the Board on this or any other policy or legal issue. If the Board decides to change its policy on the subject of recognition bars, that is a matter for the Board and not for me. I therefore shall overrule this objection.

The Employer also contends that the election should be set aside because in the Regional Director's Decision and Direction of Election, she stated that Local 100 could be certified if it won the election but that if the election was won by Local 713, then a certification would be held in abeyance pending the resolution of an 8(a)(2) charge alleging that the Employer had illegally assisted Local 713.

This statement in the Regional Director's Decision accurately reflects the legal procedure governing the case at the time that the decision was issued. Therefore, I see no basis for concluding that such a statement can be grounds for setting aside an election. I therefore conclude that this allegation has no merit and is not a basis for setting aside the election.

Finally, the Employer contends, (in a number of different formulations), that the election should not have been conducted because at the time it was held, there was an unresolved and still pending unfair labor practice charge and that Local 100 refused to execute a waiver to filing objections based on evidence supporting that charge. This too, as described by the Director in her Decision and Direction of election, is a procedural question inextricably connected to the *Dana* rationale. As *Dana* is the current law, it is my opinion that this contention should be

[5] Even assuming that Colon used his cell phone to take photographs, that would not be readily apparent to employees if they were 100 feet away and across the street. From the distance described, I doubt that any employee would have noticed that Colon was taking a picture and therefore would not be intimidated by such an action.

[6] The Employer's objections included allegations that Local 100 agents videotaped employees and that they intimidated, restrained and coerced employees by trespassing and related conduct. No evidence was presented to support these allegations and they are therefore found to be without merit.

addressed to the Board and not to me. [7] I therefore conclude that this allegation cannot be the basis for setting aside the allegation.

Parenthetically, I do not comprehend why the failure of the agency to *first* resolve a somewhat related unfair labor practice charge, (alleging that Local 713 was illegally assisted in obtaining recognition) would, by itself, have any possible impact on the potential electorate. Nor do I understand why the employees would know or care if Local 100 waived any right to file objections to the election based on evidence supporting an 8(a)(2) charge. What the Employer seems to be arguing is that the employees' interest in having their own choice in selecting a bargaining representative would be better served by postponing the election for an indefinite period of time, while an unfair labor practice charge alleging unlawful assistance to Local 713 wends its way through the prolonged procedure required to determine unfair labor practice allegations. I really don't understand why that is a preferable procedure than one pursuant to which a secret ballot election is conducted in an expeditious manner that would, in the absence of interfering or intimidating conduct by any of the parties, objectively resolve which union if any, the employees prefer.

e. The refusal to bargain allegation

The evidence in this case shows that recognition was granted to Local 713 on November 10, 2008. Nevertheless, the evidence shows that Local 713 did not request bargaining until after Local 100 filed its representation petition in the same bargaining unit. Thus, the record in this case shows that Local 713 sat on its hands for a little less than four months and did nothing to commence negotiations after the employer granted it recognition.

In cases involving voluntary recognition, the Board required the party to bargain for a reasonable time after the granting of recognition. But there is no arithmetical standard as to what constitutes a reasonable amount of time. *Royal Coach Lines*, 282 NLRB 1037, 1038 (1987).

In *AT Systems West, Inc.*, 341 NLRB 57 (2004), the Board applied a multifactor test and found that reasonable period of bargaining had not elapsed when the employer withdrew recognition 5 ½ months after bargaining had commenced. The Board found that the most probative facts were that the parties were bargaining for a first contract, that they were not at an impasse, and that they held just three, 2-hour, bargaining sessions. In the Board's opinion, those facts outweighed the countervailing considerations that the parties neither experienced any particular bargaining complexities nor were on verge of an agreement.

In my opinion, the facts in this case show that a reasonable time had passed. As noted above, the Union was recognized on November 10, 2008 but failed for a significant time, to request bargaining. There is no explanation for this delay and even assuming that employees

[7] I note that before *Dana*, the Board had a policy of holding an election in abeyance if the petitioning union filed an 8(a)(2) unfair labor practice charge. But there is nothing in the statute itself that compels such a procedure. That is, the Act does not forbid a Regional Director, in a representation case, from determining that a recent recognition agreement executed with an intervening union should not bar an election where there is evidence tending to throw substantial doubt on the Intervenor's claim that it represented an uncoerced majority at the time of its recognition. That need not be the equivalent of making an affirmative determination, in the representation case, that an unfair labor practice has been committed; but simply a determination that the intervening union's claim that its recognition should prevent the employees from having a right to an election should not be honored.

had designated Local 713 as their bargaining representative, they had nothing to show for that authorization. From the employer's point of view, it could simply sit, wait and do nothing.

Moreover, Local 713, having done nothing to represent the people in the unit finally woke up *only after* another union came onto the scene and filed a petition for an election. And when an election was ultimately held, it was objectively demonstrated that the employees in the bargaining unit did not, (even if they ever did), want to have Local 713 as their representative.

These circumstances may be somewhat sui generis and are unlikely to recur in the future. But based on the circumstances described here, I find that the Employer did not have any further obligation to bargain with Local 713 after it had failed to request bargaining for a substantial period of time and after a question concerning representation had been raised by the filing of a representation petition by Local 100. I therefore recommend that the Complaint in Case No. 2-CA-39193 be dismissed in its entirety. I also conclude that Local 713's Objections to the extent that they allege a refusal to bargain, are without merit and should be overruled.

Accordingly, based on the above and the record as whole, I conclude that the Complaint should be dismissed and that the Objections to the election should be dismissed.

ORDER

The representation case in 29-RC-11769 is be remanded to the Regional Director of Region 2, for the purpose of issuing the appropriate Certification. And the Complaint in 2-CA-39293 is dismissed in its entirety. [8]

Dated, Washington, D.C., October 4, 2010.

_____
Raymond P. Green
Administrative Law Judge

[8] Any party may, within fourteen (14) days from the date of issuance of this recommended Decision, file with the Board in Washington, DC, an original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director of Region 2. If no exceptions are filed, the Board will adopt the recommendations set forth herein. Exceptions must be received by the Board in Washington by October 19, 2010.